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Supreme Court, U.S.
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No. 88-7381

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM GEORGE BONIN,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Was petitioner denied his right to effective assistance of counsel due to a conflict of interest arising from a purported literary rights fee agreement and from the fact counsel had previous contact with a witness for the prosecution?

2. Did the prosecutor's argument to the jury during the penalty phase constitute prejudicial error within the meaning of the Booth v. Maryland (1987) 482 U.S. ___, 96 L.Ed.2d 440?

PARTIES

Petitioner, William George Bonin, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent is the People of the State of California.

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OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming his judgment of death. (People v. Bonin (1989) 47 Cal.3d 808.)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. section 1257(3).

CONSTITUTION, STATUTES AND PROVISIONS INVOLVED

United States Constitution, Sixth, Eighth and Fourteenth Amendments.

STATEMENT OF THE CASE

In an information filed by the District Attorney's Office of Los Angeles County on January 2, 1981, appellant was charged with multitudinous offenses and special allegations. (CT 1556-1596.)

In count I, appellant was charged with the murder of Donald Hyden in violation of Penal Code section 187. Two special circumstances were alleged; namely, multiple murder pursuant to Penal Code section 190.2 subdivision (a)(3) and murder in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1556-1557.)

In count II, appellant was charged with the crime of robbery in violation of section 211 of the Penal Code of Donald Hyden; it being further alleged that appellant with intent to inflict such injury, inflicted great bodily injury upon Donald Hyden within the meaning of Penal Code section 12022.7. (CT 1558.)

In count III, appellant was charged with the murder of David Murillo in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murder pursuant to Penal Code section 190.2 subdivision (a)(3) and to murder in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1559-1560.)

In count IV, appellant was charged with the crime of robbery of David Murillo in violation of section 211 of the Penal Code; it being further alleged that appellant with intent to inflict such injury, inflicted great bodily injury upon David Murillo within the meaning of Penal Code section 12022.7. (CT 1561.)

In count V, appellant was charged with the murder of Robert Wirostek in violation of section 187 of the Penal Code. A multiple murder special circumstance was alleged pursuant to Penal Code section 190.2 subdivision (a)(3). (CT 1562-1563.)

In count VI, appellant was charged with the murder of Darin Kendrick in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murder pursuant to Penal Code section 190.2 subdivision (a)(3) and murder in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1564-1565.)

In count VII, appellant was charged with the crime of robbery of Darin Kendrick in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Darin Kendrick within the meaning of Penal Code section 12022.7. (CT 1566.)

In count VIII, appellant was charged with the crime of murder of Sean King in violation of section 187 of the Penal Code, there also being a special circumstance alleged of multiple murder within the meaning of Penal Code section 190.2 subdivision (a)(3). (CT 1567-1568.)

In count IX, appellant was charged with the murder of "John Doe" in violation of section 187 of the Penal Code; there also being a multiple murder special circumstance alleged pursuant to section 190.2 subdivision (a)(3) of the Penal Code. (CT 1569-1570.)

In count X, appellant was charged with the murder of Markus Grabs in violation of section 187 of the Penal Code; it

being further alleged special circumstances as to multiple murder pursuant to section 190.2 subdivision (a)(3) of the Penal Code, murder in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17) and murder in the course of sodomy in violation of section 286 subdivisions (b)(1) and (c) of the Penal Code within the meaning of Penal Code sections 190.2 subdivision (a)(17) and 190.2 subdivision (b). (CT 1571-1572.) In count XI, appellant was charged with the crime of robbery of Markus Grabs in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Markus Grabs within the meaning of Penal Code section 12022.7. (CT 1573.)

In count XII, appellant was charged with the crime of sodomy in violation of section 286 subdivisions (b)(1) and (c) of the Penal Code upon Markus Grabs. (CT 1574.)

In count XIII, appellant was charged with the crime of murder of Thomas Lungren in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murder special circumstances pursuant to section 190.2 subdivision (a)(3) of the Penal Code, as well as murder in the course of a robbery in violation of Penal Code section 211 and in the course of mayhem in violation of Penal Code section 203 within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1575-1576.)

In count XIV, appellant was charged with the crime of robbery of Thomas Lungren in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Thomas Lungren within the meaning of Penal Code section 12022.7. (CT 1577.)

In count XV, appellant was charged with the crime of mayhem upon Thomas Lungren in violation of section 203 of the Penal Code, it being alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Thomas

Lungren within the meaning of Penal Code section 12022.7. (CT 1578.)

In count XVI, appellant was charged with the crime of murder of Charles Miranda in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murders pursuant to Penal Code section 190.2 subdivision (a)(3) and murder while in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1579-1580.)

In count XVII, appellant was charged with the crime of robbery upon Charles Miranda in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Charles Miranda within the meaning of Penal Code section 12022.7. (CT 1581.)

In count XVIII, appellant was charged with the crime of murder of James Macabe in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murder within the meaning of Penal Code section 190.2 subdivision (a)(3) and murder in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1582-1583.)

In count XIX, appellant was charged with the crime of robbery in violation of section 211 of the Penal Code upon James Macabe; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon James Macabe within the meaning of Penal Code section 12022.7. (CT 1584.)

In count XX, appellant was charged with the crime of murder of Ronald Gatlin in violation of section 187 of the Penal Code; special circumstances being alleged as to multiple murder pursuant to Penal Code section 190.2 subdivision (a)(3) and murder in the course of a robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1585-1586.)

In count XXI, appellant was charged with the crime of robbery upon Ronald Gatlin in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Ronald Gatlin within the meaning of Penal Code section 12022.7. (CT 1587.)

In count XXII, appellant was charged with the crime of murder of Harry Todd Turner in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murder pursuant to section 190.2 subdivision (a)(3) and as to murder while engaged in the crime of robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1588-1589.)

In count XXIII, appellant was charged with the crime of robbery upon Harry Todd Turner in violation of section 211 of the Penal Code; it being further alleged that appellant with intent to inflict such injury, inflicted great bodily injury upon Harry Todd Turner within the meaning of Penal Code section 12022.7. (CT 1590.)

In count XXIV, appellant was charged with the murder of Steven Wood in violation of section 187 of the Penal Code. Special circumstances were also alleged as to multiple murder pursuant to Penal Code section 190.2 subdivision (a)(3) and murder while engaged in the crime of robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1591-1592.)

In count XXV, appellant was charged with the crime of robbery of Steven Wood in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Steven Wood within the meaning of Penal Code section 12022.7. (CT 1593.)

In count XXVI, appellant was charged with the crime of murder of Steven Wells in violation of section 187 of the Penal Code. Special circumstances were alleged as to multiple murder

pursuant to section 190.2 subdivision (a)(3) of the Penal Code and as to murder while engaged in the crime of robbery in violation of section 211 of the Penal Code within the meaning of Penal Code section 190.2 subdivision (a)(17). (CT 1594-1595.)

In count XXVII, appellant was charged with the crime of robbery of Steven Wells in violation of section 211 of the Penal Code; it being further alleged that appellant with the intent to inflict such injury, inflicted great bodily injury upon Steven Wells within the meaning of Penal Code section 12022.7. (CT 1596.)

Appellant pleaded not guilty and denied the special allegations. (CT 1599.) A motion pursuant to section 995 of the Penal Code was granted as to counts V and IX only--those counts dealing with the murders of Robert Wirostek and "John Doe." (CT 1562, 1569, 1604.)

On July 29, 1981, a motion for change of venue was denied. (CT 1610.)

Jury selection began October 19, 1981, (CT 1622), with jury trial beginning on November 2, 1981.) (CT 1631.)

A motion pursuant to section 1538.5 of the Penal Code and, in the alternative, to quash and traverse the search warrant, was denied. The court also refused to suppress the testimony of witnesses Munro and Miley. (CT 1632.)

A defense motion to dismiss the great bodily injury allegations pursuant to section 12022.7 of the Penal Code in counts II, IV, VI, IX, XII, XV, XVII, XIX, XXI, XXIII and XXV of the robbery counts was granted on December 18, 1981. Appellant's motion pursuant to Penal Code section 1118 was denied. (CT 1695.) A similar allegation was subsequently stricken from count XIII. (CT 1699.)

Jury deliberations began December 28, 1981. (CT 1700.) On January 6, 1982, jury verdicts were returned as follows: In count I, appellant was found guilty of murder in the first degree. As to the special circumstances, the jury found that the murder of Thomas Lungren was not true; the murder of Markus Grabs

was true; that the murder of Sean King was not true; that the murder of David Murillo was true; that the murder of Charles Miranda was true; that the murder of James Macabe was true; that the murder of Ronald Gatlin was true; that the murder of Harry Todd Turner was true; that the murder of Steven Wood was true; that the murder of Darin Kendrick was true; that the murder of Steven Wells was true; and that the murder of Donald Hyden, committed while engaged in the crime of robbery, was true. (CT 1975-1977.) The jury also found appellant guilty of robbery of Donald Hyden in count II. (CT 1977.)

The jury found appellant guilty of the murder of David Murillo and found it to be of the first degree. The finding of the special circumstances were the same as those of the Donald Hyden murder except that they also found the murder of Donald Hyden also to be true. (CT 1977-1979.) The murder of David Murillo was found to have been committed while appellant was engaged in the crime of robbery. (CT 1977-1979.) Additionally, appellant was found guilty of the robbery of David Murillo in count IV. (CT 1979.)

Appellant was found guilty of murder in the first degree of Darin Kendrick. The finding of the multiple murder circumstance was the same as the murder of Donald Hyden except, of course, it included the murder of Donald Hyden. The special circumstance alleging that appellant was engaged in the crime of robbery was found to have been true. (CT 1979-1981.) Appellant was also found guilty of the robbery of Darin Kendrick in count VI. (CT 1981.)

Appellant was found not guilty of the murder of Sean King. (CT 1982.)

Appellant was found guilty of the first degree murder of Markus Grabs. The special circumstance relative to multiple murder was the same as that of Donald Hyden except, of course, the murder of Donald Hyden was included as a special circumstance. (CT 1982-1983.) The special circumstance was also

found to be true that appellant killed Marcus Grabs while engaged in the crime of robbery. (CT 1983.)

The sodomy special circumstance was found to be untrue. (CT 1984.) Appellant was found to be guilty of robbery of Markus Grabs in count IX, but not guilty of sodomy of Markus Grabs in count X. (CT 1984.)

Appellant was found not guilty of the murder of Thomas Lungren in count XI, not guilty of the robbery of Thomas Lungren in count XII and not guilty of the mayhem of Thomas Lungren in count XIII. (CT 1984-1985.)

Appellant was found guilty of the first degree murder of Charles Miranda and the special circumstances were found to be true relative to the multiple murder as to Donald Hyden except, of course, for the special circumstance relative to the murder of Donald Hyden. (CT 1985-1986.) The special circumstance that the murder was committed while appellant was engaged in the crime of robbery was found to be true. (CT 1987.) Appellant was also found guilty of the robbery of Charles Miranda in count XV. (CT 1987.)

Appellant was found guilty of the first degree murder of James Macabe and the special circumstances relative to multiple murder were found to be true as with Donald Hyden except, of course, for the special circumstance relative to Donald Hyden. (CT 1987-1989.) Additionally, the special circumstance was found true that the murder was committed while appellant was engaged in the crime of robbery. (CT 1989.) Additionally, appellant was found guilty of the robbery of James Macabe. (CT 1989.)

Appellant was also found guilty of the first degree murder of Ronald Gatlin in count XVIII. The special circumstances relative to multiple murder were the same as Donald Hyden except, of course, as to the one alleged relative to Donald Hyden. (CT 1989-1900.) Additionally, the robbery special circumstance was found to be true and appellant was found guilty of the robbery of Ronald Gatlin in count XIX. (CT 1991.)

Appellant was found guilty of the first degree murder of Harry Todd Turner in count XX. The multiple murder special allegations were found to be true and were the same as Donald Hyden except, of course, for the special circumstance concerning Donald Hyden. The robbery special circumstance was found to have been true and appellant was also found guilty of the robbery of Harry Todd Turner in count XXI. (CT 1991-1993.)

Appellant was found guilty of the first degree murder of Steven Wood in count XXII and the multiple murder special allegations were found to have been true as in the case of Donald Hyden except, of course, for Donald Hyden's special circumstance. The robbery special circumstance was found to be true and appellant was also found guilty of the robbery of Steven Wood in count XXIII. (CT 1993-1995.)

Appellant was found guilty of the first degree murder of Steven Wells in count XXIV and the multiple murder special circumstance was found to be true as in the case of Donald Hyden except, of course, for the special circumstance concerning Donald Hyden. The robbery special circumstance was found to be true and appellant was found guilty of the robbery of Steven Wells in count XXV. (CT 1995-1997.)

The penalty phase of trial commenced January 14, 1982. (CT 2002 et seq.) On January 20, 1982, the jury returned ten death verdicts as to the murders of: James Macabe, Donald Hyden, Steven Wells, Darin Kendrick, Steven Wood, Harry Todd Turner, Ronald Gatlin, Charles Miranda, David Murillo and Markus Grabs. (CT 2078-2079.)

On March 12, 1982, appellant's motions for new trial and to modify the penalty were denied by the court with the trial court's reasons noted in the record. (CT 2083-2086, 2089-2094.)

Thereafter, the trial judge ordered that appellant should be put to death as to counts I, III, V, VIII, XIV, XVI, XVIII, XX, XXII and XXIV. (CT 2093.) The court further provided that should appellant's sentences be reduced to life imprisonment, with or without the possibility of parole, each

sentence was to run consecutively as permitted by Penal Code section 669. (Id.)

Appellant was also sentenced on the non-capital matters. (CT 2092-2093.)

Upon automatic appeal to the California Supreme Court, the judgment was affirmed in its entirety. (People v. Bonin, supra, 47 Cal.3d 808.)

STATEMENT OF FACTS

"As a result of his activities in Southern California in the years 1979 and 1980, defendant -- who was then in his early 30's -- was dubbed the 'Freeway Killer' and his murders the 'freeway killings.' After he was tried in this Los Angeles County proceeding, he was tried in Orange County action No. C-47500. There he was convicted of the first degree murder and robbery of Dennis Frank Fox, Glenn Barker, Russell Rugh, and Lawrence Sharp; as to each murder count a multiple-murder special-circumstance allegation was found true; and for each murder he received the penalty of death.

"The evidence introduced at the guilt phase of this action -- insofar as it concerns the crimes of which defendant was convicted -- tells the following story.

"On August 6, 1979, the nude body of 17-year-old Marcus Grabs was found in Malibu Canyon near Las Virgenes Canyon Road; except for the victim's backpack, no clothing or other identifying evidence was discovered at the scene. Grabs had been killed by multiple stab wounds on August 5. The body showed signs of beating about the face and elsewhere and exhibited ligature marks on one ankle as well as on the neck.

"On August 27, 1979, the nude body of 15-year-old Donald Hyden was found in the area of Liberty Canyon near the Ventura Freeway; no clothing or other

identifying evidence was discovered at the scene. Hyden had been killed by ligature strangulation about August 25 or 26. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

"On September 12, 1979, the nude body of David Murillo was found alongside the Ventura Freeway near the Lemon Grove overpass; no clothing or other identifying evidence was discovered at the scene. Murillo had been killed by ligature strangulation about September 9 or 10. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on the wrists as well as on the neck, and revealed indications of sexual activity before death.

"On February 3, 1980, the nude body of 15-year-old Charles Miranda was found in an alley in downtown Los Angeles; no clothing or other identifying evidence was discovered at the scene. Miranda had been killed by ligature strangulation the same day. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

"On February 6, 1980, the fully clothed body of 12-year-old James Macabe was found near Walnut Drive in Walnut in front of the Pomona Freeway; no identifying evidence other than the clothing was discovered at the scene. Macabe had been killed by ligature strangulation on February 3. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

"On March 15, 1980, the nude body of 19-year-old Ronald Gatlin was found near Central Avenue in Duarte; no clothing or other identifying evidence was discovered at the scene. Gatlin had been killed by ligature strangulation on March 14 or 15. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

"On March 25, 1980, the nude body of 14-year-old Harry Todd Turner was found in an alley in Los Angeles; no clothing or other identifying evidence was discovered at the scene. Turner had been killed by ligature strangulation sometime on or after March 20. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on the neck, and revealed indications of sexual activity before death.

"On April 11, 1980, the nude body of 16-year-old Steven Wood was found in an alley in Long Beach near the Pacific Coast Highway; no clothing or other identifying evidence was discovered at the scene. Wood had been killed by ligature strangulation on April 10 or 11. The body showed signs of beating about the face and elsewhere and exhibited ligature marks on at least one ankle and wrist as well as on the neck.

"On April 30, 1980, the nude body of 19-year-old Darin Lee Kendrick was found on Avalon Street in Carson near the Artesia Freeway; no clothing or other identifying evidence was discovered at the scene. Kendrick had been killed by ligature strangulation and a stab wound to the upper cervical spinal cord on April 29 or 30. The body showed signs of beating about the face and elsewhere and exhibited ligature marks on at least one ankle and wrist as well as on the neck.

"On June 3, 1980, the nude body of 18-year-old Steven Wells was found behind a gasoline station in Huntington Beach; no clothing or other identifying evidence was discovered at the scene. Wells had been killed by ligature strangulation on June 2. The body showed signs of beating about the face and elsewhere, exhibited ligature marks on at least one ankle and wrist as well as on the neck, and revealed indications of sexual activity before death.

"In order to establish that it was defendant who had perpetrated the killings, the prosecution called to the stand Gregory Miley and James Munro.

"Miley, a sexual partner of defendant and about 19 years old at the time relevant here, testified that it was defendant who was responsible for the death of Miranda and Macabe. Specifically, he said that he was with defendant as defendant was driving a van he owned on the night of February 2, 1980; defendant picked up Miranda in Hollywood in the early morning hours of February 3. and consensually sodomized him in the back of the van; defendant whispered to Miley, 'The kid's going to die,' and then started to tie up the youth; defendant asked, 'What does your dad want for you? How much do you think we can get for ransom" Maybe a couple thousand?' and Miranda responded, 'I don't think I can get that much'; defendant asked, 'How much money do you have?' and Miranda replied, 'About $6'; defendant told Miley to take the money, and he complied; Miley said, 'Well, why don't you let the kid go?' and defendant answered, 'Mo, man, he'll know the van and he'll know us'; with Miley's help defendant proceeded to beat Miranda and to strangle him with a shirt and to crush his neck with a jack handle; defendant and Miley dumped Miranda's nude body in an

alley and disposed of his clothing in various locations.

"After doing the deed, Miley continued, defendant said. 'Well, I'm horny again. I need another one,' Miley responded, 'Oh, man, no way, I don't want to do it no more. I just want to go home,' but defendant went ahead and eventually picked up Macabe in Huntington Beach in the early afternoon of the same day, February 3, 1980; not long afterwards, defendant and the boy engaged in consensual sexual activity in the van; the trio then drove on; again defendant and the boy engaged in consensual sexual activity; soon, however, defendant started to tie up Macabe; he asked, 'What could you get for ransom?' and stated, 'This is a kidnap'; the boy tried to fight back; with Miley's help defendant proceeded to beat Macabe and to strangle him with a shirt and to crush his neck with a jack handle; defendant and Miley dumped Macabe's fully clothed body onto the side of a road and took money from his wallet; defendant then threw the wallet out of the van's window.

"Miley admitted that he had been arrested and charged with the first-degree murder of Miranda and Macabe. He also admitted that he had been allowed to enter a plea of guilty to those charges with concurrent sentences of imprisonment for 25 years to life on the condition that he would testify truthfully against defendant.

"Munro, who -- like Miley -- was a sexual partner of defendant and about 19 years old at the time relevant here, testified that it was defendant who was responsible for the death of Wells. Specifically, he said that he was with defendant as defendant was driving his van on June 2, 1980; defendant picked up Wells as he was hitchhiking and participated in mutual

consensual oral copulation with him in the back of the van; the trio eventually arrived at defendant's home in Downey; there, defendant and Wells continued their sexual activity, and Munro joined in; soon defendant persuaded Wells to allow himself to be tied up; defendant took from Wells's wallet $10, which was all the money it contained, and also various items of identification; with Munro's help he then beat Wells and strangled him with a T-shirt, disposed of his clothing and other property, and eventually dumped his body behind a gasoline station; defendant told Munro that he was the 'Freeway Killer,' that Miley was one of his partners in crime, and that he had committed about 14 murders in the course of his activities.

"Munro admitted that he had been arrested and charged with the first-degree murder of Wells. He also admitted that he had been allowed to enter a plea of guilty to second-degree murder with a sentence of 15 years to life imprisonment on the condition that he would testify truthfully against defendant.

"The prosecution also introduced evidence of extrajudicial admissions by defendant linking him to the crimes charged. Among other witnesses it called David Lopez, a reporter for Los Angeles television station KNXT. Lopez testified that defendant admitted that it was he who killed the 10 young men and boys named above as well as others, Scott Fraser and Ray Pendleton, acquaintances of defendant, each stated that defendant said that while driving his van he picked up Grabs and in the course of a sexual encounter killed the youth. Jailhouse informers testified to various admissions on the part of defendant. Other witnesses gave testimony to the effect that defendant said he would not leave witnesses to his criminal activity alive.

"The prosecution presented expert testimony to the following effect; the bodies of Miranda, Wells and Wood each bore a kind of triskelion-shaped fiber that was not common but was consistent with carpeting in defendant's van; the bodies of Gatlin, Grabs and Macabe each revealed the presence of foreign hair that matched defendant's; the body of Gatlin bore a seminal fluid stain that could have been made by defendant; and the van and defendant's home were stained in several placed with human blood.

"The defense generally tried to show that the prosecution had not carried its burden of proof beyond a reasonable doubt. Particularly, it attempted to discredit the witnesses who testified against defendant.

"At the penalty phase the prosecution presented evidence in aggravation. Some of that evidence related to prior adjudicated felonies. Defendant committed sexual attacks in late 1968 and early 1969 against 12-year-old Lawrence B., 14-year-old William J., 17-year-old John T., and 18-year-old Jesus M. As a result of his activities, he was convicted of molesting and forcibly orally copulating Lawrence B., kidnapping and sodomizing William J., sodomizing John T., and forcibly orally copulating Jesus M., and was committed to Atascadero State Hospital as a mentally disordered sex offender amenable to treatment. In 1971 he was returned to court, declared unamenable to further treatment, and committed to prison. In 1974 he was released. In 1975 he committed a sexual attack on 14-year-old David M. Later that year he was convicted of forcibly orally copulating the boy and was sentenced to prison. In 1978 he was paroled. The prosecution also introduced evidence relating to the Orange County killings, attempting to prove that in late 1979 and

early 1980 defendant killed, and committed other offenses against, Dennis Frank fox, Glenn Barker, Russell Rugh, and Lawrence Sharp.

"In mitigation the defense presented evidence to the following effect. Defendant's father caused the family serious problems as a result of drinking and gambling. At age 10 defendant was in trouble and was sent to a detention home; while there he was sexually molested. At age 12 he stole a truck and was put in custody. Later, he joined the armed forces, served in Vietnam, and was decorated. A psychologist opined that defendant could function in the structured setting of a prison -- and only in such a setting -- and that there he could be productive." (People v. Bonin (1989) 47 Cal.3d 808, 820-824.)

SUMMARY OF RESPONDENT'S ARGUMENTS

Petitioner was not deprived of his constitutional right to effective assistance of counsel. There has never been a showing there existed a literary rights fee agreement between counsel and petitioner and, in any event, as the California Supreme Court concluded, petitioner failed to demonstrate counsel's performance was adversely affected by either this circumstance or the prior contact with the witness, James Munro.

There was no objection during the prosecutor's argument to the jury concerning his reference to the impact of the murders on the families of the victims. Moreover, this argument was framed in the context of the CALJIC No. 8.84.1(a), involving the facts of the case. In this regard, the prosecutor's reference in no measure parallels the victim impact statement scrutinized by this Court in Booth v. Maryland, supra. Lastly, even if the prosecutor's reference to the impact on the families of the victims during his argument to the jury during the penalty phase was Booth error it was harmless beyond a reasonable doubt. (Chapman v. California (1968) 384 U.S. 18, 34.)

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ARGUMENT

I

PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Despite his unequivocal request for attorney Charvet, Petitioner contends he was denied his right to effective assistance of counsel on two grounds: (1) the existence of a literary rights fee arrangement between himself and counsel and (2) the contacts counsel had with prosecution witness James Munro prior to petitioner's trial. On neither of these grounds should petitioner prevail.

A. The Facts Surrounding The Substitution of Attorney

The request for substitution of attorney was first made September 3, 1981, before Judge Ringer. (RT A1 102.) The matter was eventually set for September 14, 1981, before Judge Keene.

On that day, the motion was again brought. Deputy District Attorney Norris vehemently expressed his opposition on three grounds. First, it was argued this substitution was nothing more than a dilatory tactic designed to prejudice the People's case against appellant. It was pointed out by the prosecution they had been prepared since May 4th, only to have the court grant two continuances of time over their objection. (RT A1 111-114.) Secondly, the prosecutor contended Charvet had a conflict of interest in the case because he had previously been in contact with witness Munro and considered representing him. This contact, it was asserted, had involved discussions with Munro about the facts of this case. (RT A1 115-116; 125-128.) Lastly, Norris referred to the retainer agreement between Charvet and appellant which purported to involve the attorney retaining any future literary rights there may be in the case. (RT A1 116-117, 124.) In support of his assertion the substitution was merely an attempt to delay the trial, the prosecution introduced a taped conversation between appellant and two of his friends. While the tape itself was not transcribed into the record, it is

apparent appellant told his friends if Charvet were not substituted in appellant would ask to go pro per and then request a six-month continuance, after which appellant would request another attorney to represent him. (RT A1 128-129.)

Mr. Hanson, after acknowledging he was never appellant's attorney of choice, voiced no opposition to the substitution. (RT A1 108-109.)

Appellant specifically requested Charvet as his attorney. (RT A1 109.)

On his behalf, Charvet indicated his contacts with Munro were minimal and involved nothing that would affect his being able to defend appellant. (RT A1 118-120.) He also indicated appellant waived "all semblance of any type of conflict of interest," and would be willing to say so on the stand. (RT A1 120-121.) As concerned the issue of any book arrangement with appellant, Charvet refused to discuss details, stating instead that if the only asset of an accused was a book right, he could use it to get the attorney of his choice. (RT A1 123.)

After hearing argument and listening to the prosecutor's tape, the trial court asked appellant why he wanted Charvet as his attorney. Appellant responded, ". . . I feel like I have a much better rapport with Mr. Charvet than I do with any other attorney, at this point." (RT A1 134.) Appellant had "personal vibes" which precluded him from discussing certain aspects of the case with Hanson. (RT A1 135.)

Thereafter, the trial court, in no uncertain terms, concluded appellant's attempt at substituting Charvet in as attorney was, indeed, a delaying tactic. In addition, the court was "deeply concerned" with the contact Charvet had previously with Munro; finding there was a conflict. (Ibid.) Unless ordered to do so by an appellate court, trial was to proceed with Hanson as counsel. (RT A1 136; see comments by court on RT A1 138.) Appellant then acknowledged that if Charvet were not permitted to act as his counsel, appellant would proceed as his own attorney, although he could not guarantee he would be ready

to proceed to trial on the date the trial was to begin, one week hence. (RT A1 139-140.)

On September 21, 1981, Charvet again attempted to come in as the attorney of record. Apparently, a writ of mandate filed with the Court of Appeal had been denied. Charvet expressed his intention of filing a petition with the Supreme Court. The trial court reluctantly agreed the issue should be decided by the Supreme Court. Again, it was indicated that were Charvet not accepted as appellant's counsel of record, appellant would proceed pro per. It was also noted, appellant would not be prepared for trial, but if given the choice between Hanson as his attorney, and proceeding pro per, appellant would choose the latter course. The trial court continued the matter for approximately 30 days, to October 19th. At that time, trial was to begin in one of three manners: with Charvet as appellant's counsel, with Hanson as appellant's counsel, or with appellant as his own attorney, with Hanson acting as advisory counsel. It was clearly contemplated there would be some ruling from the Supreme Court on the propriety of Charvet serving as appellant's attorney. (RT A1 141-147.)

Thereafter, on October 19, 1981, Charvet was substituted in as appellant's attorney. Appellant expressly indicated it was his desire Charvet represent him. (RT 1 1-2.)

B. Discussion

In its decision, the California Supreme Court, in accordance with American Bar Association dictates, recognized that a "'grave conflict of interest can arise . . .'" when a lawyer is given the rights to publish a book about the offenses for which he represents the accused. (People v. Bonin (1989) 47 Cal.3d 808, 836.) In analyzing the trial court's action, the California Supreme Court paid close attention to the mandates of this Court by acknowledging the trial court has an obligation when it knows or reasonably should know of the possibility of a conflict of interest to make an inquiry into the matter. (Ibid, citing, inter alia, Wood v. Georgia (1981) 450 U.S. 261, 272;

Holloway v. Arkansas (1978) 435 U.S. 475, 484.) When the court fails to fulfill its obligation in this regard Wood error has been committed. Reversal is required, however, only when it has been shown there was an actual conflict which adversely affected counsel's performance. (Id., at pp. 837-838, citing Wood v. Georgia, supra, 450 U.S. at pp. 272-274; Brien v. United States (1st Cir. 1982) 695 F.2d 10, 14-15; Strickland v. Washington (1984) 466 U.S. 668, 692.)

The California Supreme Court determined there was insufficient evidence upon which to conclude the trial court knew or should have known a literary rights contract existed. The crux of this aspect of the court's holding was that given the complete absence of anything but speculation, finding the trial court had an obligation to inquire under these circumstances would create an "intolerable" burden on trial courts since in almost every case a conflict was "'possible.'" (People v. Bonin, supra, 47 Cal.3d at p. 838.)

While petitioner assails this conclusion, the fact remains nothing in his analysis of the scenario in Wood demonstrates any error in the conclusion drawn by the California Supreme Court. In Wood the conflict was flagrant. The attorney representing the owner of an adult book store, also represented the employees of that store who had been convicted of selling lewd materials. The probation of the employees had been revoked because the owner of the store had decided not to pay the employees' fines as promised, electing instead to challenge the propriety of the fines on constitutional grounds. (Id., at pp. 263-264; 266-267.) There was, then, an unmistakable, actual conflict of interest which clearly adversely affected the interests of the defendants.

While petitioner asserts the California Supreme Court "dodges" the holding of Wood in reaching its conclusion, nothing could be further from the truth. Petitioner's selection of private counsel to represent him created no semblance of impropriety but for the fact petitioner was indigent. There was

no other "evidence" of any kind to indicate the existence of such an agreement. To suggest counsel's refusal to reveal the source of his fee with petitioner is stronger evidence than that presented in Wood is patently insupportable.

As concerns the conflict due to counsel's contacts with the witness Munro, the California Supreme Court concluded the trial did fail in its obligation to inquire as required by Wood. (People v. Bonin, supra, 47 Cal.3d at p. 838.) While the trial court had initially recognized the conflict and denied the requested substitution, on the first day of trial the substitution was permitted. (Id., at p. 839.) Despite petitioner's specific request to be represented by Charvet, and despite petitioner's presence at the hearing in which Charvet's contacts with Munro were discussed, the California Supreme Court determined the trial court had the obligation to ensure petitioner had knowingly waived any conflict of interest concerning his attorney of choice. (Id., at pp. 839-842.)[1]

Relying on this Court's actions in Wood, and a similar understanding of Wood by the court in United States v. Winkle (10th Cir. 1983) 722 F.2d 605, 611-612, the California Supreme Court found the error was not reversible per se. Accordingly, the court undertook an examination of counsel's performance, particularly as it concerned dealing with Munro at trial. In this regard the court was unable to find any inkling of an adverse effect on counsel's performance. Nor could the court even conjecture such a problem. (People v. Bonin, supra, at p. 843.) Thus, the court refused to reverse.

1. In an apparent oversight, the California Supreme Court failed to note petitioner's waiver to any conflict attaching to attorney Charvet's previous contact with Munro. In response to the prosecutor's request petitioner make an on the record waiver of any conflict the court specifically addressed petitioner on this issue and received a specific waiver. (See RT I 90-91.) In light of the California Supreme Court's decision, respondent will examine the question of whether reversal was mandated. Given what appears to be a specific waiver of the conflict issue as it pertains to contacts with Munro, however, respondent submits this question is moot.

Petitioner's assertion this case is analogous to Glasser v. United States (1942) 315 U.S. 60 and Holloway v. Arkansas, supra, 435 U.S. 475 is untenable. In Glasser, the court appointed the same counsel to represent co-defendant Kretske over the objections of defendant Glasser. Despite defendant Glasser's objections, the court undertook an examination of the record and concluded that attorney "Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made." (Glasser v. United States, supra, 315 U.S. at p. 76, emphasis added.) Clearly, the California Supreme Court was unable to reach the same conclusion.

In Holloway, the trial court appointed the same counsel to represent three defendants accused of rape and robbery, despite the objection of counsel that the defendants told him there could be conflicting interests. After first acknowledging it is not per se violative of the constitutional right to effective counsel to permit joint representation, the court interpreted Glasser as mandating reversal when, over objection by the defendant or his attorney, the trial court requires joint representation. (Holloway v. Arkansas, supra, 435 U.S. at p. 488.)

In this regard, the circumstances of each case must be deemed significant. Here there was neither an objection by petitioner or his counsel, nor was there any compulsion counsel jointly represent the witness, Munro. Any conflict stemmed from Munro's contacting the attorney about possible representation. In this context, then, the proper remedy is that undertaken by the California Supreme Court; an examination of the record to determine whether there was any adverse effect on counsel's performance.

As the California Supreme Court noted (People v. Bonin, supra, 47 Cal.3d at p. 843), this understanding of the Wood holding was revealed in Brien v. United States, supra, 695 F.2d 10, 15, fn. 10, and United States v. Winkle, supra, 722 F.2d at pp. 611-612. In the latter case, it was defense counsel who

brought up conflict and the appellate court did note problems developing during trial for the attorney based on his previous representation of a government witness. Under such circumstances, the court ordered a remand, rather than a reversal to permit the trial court to determine whether counsel's performance was adversely affected.

That the California Supreme Court chose the proper path is best exemplified by the conclusion reached by this Court in Cuyler v. Sullivan (1980) 446 U.S. 335. There, this Court concluded a defendant who raises no objection to the conflict at the trial level must demonstrate both an actual conflict and prejudice. When a defendant has demonstrated an actual conflict has adversely affected the adequacy of his counsel's representation, there is no need to demonstrate prejudice. (Id., at pp. 349-350; see also Dukes v. Warden (1972) 406 U.S. 250, 256.) In the instant case, while the California Supreme Court agreed with the trial court that a conflict existed, the threshold showing of any adverse effect on counsel's performance was never made.

When, as in the instant case, there is not only an attempted waiver of any conflict (footnote 1, supra) but there is no forced joint representation of co-defendants with conflicting interests, a reversal is not warranted in the absence of a showing counsel's conflict prejudiced his representation of petitioner.

II

THE PROSECUTOR'S ARGUMENT DURING THE PENALTY PHASE WAS NOT VIOLATIVE OF BOOTH V. MARYLAND

Petitioner contends the prosecutor's argument to the jury during the penalty phase, in which reference was made to the effect of the murders on the families of the victims (RT 5491-5493), was violative of this court's pronouncement in Booth v. Maryland (1987) 482 U.S. 496 which overturned a Maryland statute mandating the use of victim impact statements. Petitioner's comparison does not work, procedurally or substantively.

Initially, it must be noted petitioner cannot now raise this issue since there was no objection at trial. This Court has previously recognized the failure to object at trial, even to errors of constitutional magnitude, precludes them from being raised on appeal. (See, Schmerber v. California (1965) 384 U.S. 757, 765-766, fn. 9; Wainwright v. Sykes (1976) 433 U.S. 72, 86-90.)

Assuming the merits of petitioner's claim are addressed there are three substantive bases which conclusively refute petitioner's conclusion. First, petitioner is complaining about an argument which was relevant under CALJIC No. 8.84.1(a) (CT VIII 2010-2012) which told the jury to consider "the circumstances of the crime of which defendant was convicted in the present proceedings and the existence of any special circumstance[s] found to be true." In talking about the effect on the victims' families, the prosecutor made specific reference to the victims' ages, as well as the dehumanizing manner in which they were murdered. In this regard, then, the prosecutor's argument was proper.

In this same vein, the VIS employed in Booth cannot validly be compared to the argument of the prosecutor below. In Booth, the VIS read to the jury contained information concerning the emotional and personal problems caused the family as a result of the crimes. (Booth v. Maryland, supra, 482 U.S. at p. 499-500.) It noted the family members had described the victims as being "'butchered like animals.'" The granddaughter of the victims opined the defendant could never be rehabilitated. (Ibid.) The jury was permitted to hear this report over defense counsel's objection the information contained in the VIS would inflame the jury in its selection of the appropriate penalty. (Ibid.)

Unlike the personal expressions by the family members in Booth, the prosecutor's argument below was directed at the circumstances of the offense, both as to the age of the victims and the manner in which they were murdered. While the district

attorney did refer to the effect on the families, it was certainly a logical argument given the fact each of the victims was a young son. This Court in Booth found the VIS misdirected the jury's consideration to the character of the victim and the effect on the family. (Booth v. Maryland, supra, 482 U.S. at p. 504.) The court also sought to avoid the imposition of the death penalty being dependent on the eloquence and persuasiveness of the victim's family, rather than on the circumstances of the offense. (Id., at p. 505.) Nothing in the prosecutor's argument to the jury runs afoul of these sentiments. The jury was not advised to impose the death penalty because of the effect on the families, but rather that such an effect was a natural by-product of the murder of such youthful victims. Contrary, to petitioner's conclusion, then, the prosecutor's argument did direct the jury to give individualized consideration to the appropriate penalty based on the characteristics of petitioner and the crimes he committed. (Zant v. Stephens (1983) 462 U.S. 862, 879.)

Nor do the prosecutor's statements run afoul of this Court's recent decision in South Carolina v. Gathers (June 12, 1989, 88-305) ___ U.S. ___. There the prosecutor went to great lengths to describe to the jury the type of person who Gathers had murdered. By referring to the victim's voter registration card and by reading from a religious tract carried by the victim, this Court found that under the rationale of Booth, the prosecutor had introduced factors about the victim the defendant might not have known. (Slip opn., pp. 5-6.)

In the instant case the prosecutor briefly commented on the impact of the murders on the families of the victims. This was done in the context of their age, a factor petitioner would know. Each of petitioner's victims was young and while petitioner may not have known their exact age, it would not be difficult to surmise the boys were the young sons of their parents, whose degrading murders would leave an indelible imprint

on their families. In the context of petitioner's offenses, the prosecutor's argument was neither Booth nor Gathers error.

Finally, even assuming the prosecutor's argument passed over the line of propriety it is clear any error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.) The sheer magnitude of petitioner's crimes and their attendant indignities to the sanctity of life were appalling. Had the brief reference to the effect on the victims' families been removed from the prosecutor's argument, the jury's penalty decision would have been the same.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for certiorari be denied.

Respectfully submitted,

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No: 88-7381
October Term, 1988

WILLIAM GEORGE BONIN

Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF RESPONDENT IN OPPOSITION as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and NINE (9) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

William Dean Freeman
Deputy State Public Defender
107 South Broadway, Suite 9111
Los Angeles, CA 90012

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 15 day of June, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, June 15, 1989.

ANNE MARIE BUFORD

Subscribed and sworn to before me
this 15th day of June 1989.

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Notary Public in and for said County and State

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-7381

William George Bonin (Petitioner or Appellant) vs. People of the State of California (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for

The State of California

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature _____

(Type or print) Name Steven H. Zeigen

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A